Office - Supreme Court
FILED
SEP 28 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1067

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

CHARLES N. STEELE *
General Counsel
RICHARD B. BADER
Assistant General Counsel
MIRIAM AGUIAR
JEFFREY H. BOWMAN
SONDRA L. MILLS
Attorneys
Attorneys for
FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

* Counsel of Record

SEPTEMBER 28, 1981

TABLE OF AUTHORITIES

Cases:	Page
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973)	4
Buckley v. *Valeo*, 424 U.S. 1 (1976)	*passim*
Burroughs v. *United States*, 290 U.S. 534 (1934)	5
California Medical Association v. *Federal Election Commission*, 641 F.2d 619 (9th Cir. 1980) (en banc), *aff'd*, —— U.S. ——, 101 S.Ct. 2712 (June 26, 1981)	4, 5
Johnson v. *Robison*, 415 U.S. 361 (1974)	10
Speigel, Inc. v. *Federal Trade Commission*, 540 F.2d 287 (7th Cir. 1976)	10
United States v. *Pipefitters*, 407 U.S. 305 (1972)	4

Statutes and Regulations:	
2 U.S.C. § 437f	5
26 U.S.C. § 9012(b)	6, 7
26 U.S.C. § 9012(f)	*passim*
Pub. L. No. 92-225, 86 Stat. 3 (1972)	8
11 C.F.R. § 114.5(d)	4

Legislative History:	
112 Cong. Rec. 13,544 (1966)	9
112 Cong. Rec. 28,765 (1966)	9
112 Cong. Rec. 28,781-2 (1966)	9
112 Cong. Rec. 28,784 (1966)	9
113 Cong. Rec. 8061-63 (1967)	9
113 Cong. Rec. 8295 (1967)	9
113 Cong. Rec. 8308-09 (1967)	9
113 Cong. Rec. 9385 (1967)	9
113 Cong. Rec. 11,480 (1967)	9
117 Cong. Rec. 41,763 (1971)	9
117 Cong. Rec. 41,777 (1971)	9
117 Cong. Rec. 41,947 (1971)	8
117 Cong. Rec. 41,953 (1971)	8
117 Cong. Rec. 42,399 (1971)	9
117 Cong. Rec. 42,952 (1971)	9
H. R. Rep. No. 96-442, 96th Cong., 1st Sess (1979)	10

Miscellaneous: Page

AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062 11
AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564, *withdrawn*, ¶ 51 6
AO 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206 11
National Journal, September 13, 1980 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1067

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

1. Appellees argue that Congress cannot, consistent with the Constitution of the United States, limit expenditures of organized political committees in order to assure that public financing will not become merely a subsidy for private campaign spending. They contend that the individual first amendment freedoms of a candidate's supporters are abridged when Congress limits the ability of political committee organizers to accept and transform contributions into expenditures.[1] However, appellees are not merely groups of individuals who joined to-

[1] Appellee Americans for an Effective Presidency ("AEP") also argues that § 9012(f) intrudes on "issue discussion." AEP Br. at 21-22. The Fund Act was structured to encourage direct political participation by individuals and does not affect purely issue discussion. Federal Election Commission's ("FEC") Brief ("Br.") at 40-44.

gether to publish their views on the 1980 election. Rather, they are the paradigm of political committees, controlled by experienced political supporters of the candidate, who expend funds they have solicited from others for the purpose of enhancing the candidate's election campaign, with the realistic expectation of "earn[ing] some measure of loyalty from a candidate . . . [by] effectively advocat[ing] the candidate's election." Americans For Change ("AFC") Brief ("Br.) at 44. As such, appellees represent the very danger to the integrity of the public financing scheme that § 9012(f) was intended to forestall.

The undisputed facts concerning the character of appellees demonstrate that they fall "within the core area sought to be addressed by Congress." *Buckley* v. *Valeo*, 442 U.S. 1, 79 (1976) (*"Buckley"*). Contrary to their arguments, appellees are not merely "pooling agents" for "small voices" of individuals seeking to make their political speech more effective. FEC Jurisdictional Statement ("J.S.") at 17a. They are clearly not similar to an individual, or a group of individuals, who spend their own funds to express their support for a candidate. Rather, they are ongoing entities[2] managed by sophisticated

[2] *See* FEC Br. at 25-26, 45-46. In the year since the 1980 presidential election, appellee committees have continued to be politically active. The public reports filed with the FEC for the period January 1, 1981 through July 1981 disclose that AFC received approximately $261,731 in contributions and expended approximately $235,175, only $5,270 of which was used to retire debts and obligations from the 1980 election; Fund for a Conservative Majority ("FCM") received approximately $585,223 in contributions and has already expended approximately $566,217, including $10,799 in contributions to 12 candidates for the 1981-82 election cycle; and AEP received approximately $2,625 in contributions and expended approximately $36,021. Appellees' disclosure reports are available for inspection at the Commission.

political professionals,[3] whose contributors have no voice either in the policies or operation of the committees, or in determining how, where, when and for whom money will be spent.[4]

These permanent, well organized political committees have displayed their ability to amass large campaign coffers to spend on presidential elections.[5] Spending by unauthorized political committees on behalf of presidential candidates has increased dramatically during the past four years. FEC Br. at 24. The level of spending by such committees during the 1980 elections demonstrates their ability to exert a significant influence on the electoral process—an influence which no presidential candidate can afford to ignore. Indeed, expenditures by such committees

---

[3] AFC is run by a "steering committee that includes 63 corporate executives, 34 retired House members, 5 Senators, 10 retired governors and 5 former ambassadors." National Journal, September 13, 1980, at 1515. AEP is "laden wtih former officials from the Ford and Nixon Administrations." *Id.* See FEC Br. at 25 n.35.

[4] Indeed, contributors to these multicandidate committees cannot be certain that their contributions will be used by the committees to advocate the election of any particular candidate. See FEC Br. at 46-47. In fact, contributors cannot be sure their contributions will be used for political advocacy. For example, public disclosure reports reveal that AEP in early 1981 spent $6,283.53 for an "inaugural party" in Washington, D.C.; in May, 1981, AFC expended $5,500 for tickets to a "gala"; and in January, 1981 it expended $4,000 as a "performance fee."

[5] *See Data Compiled From the Public Records of the Federal Election Commission* at VII; FEC Br. at 26, 45-48.

might well come to exceed the total allotment for a publicly funded candidate, with the result that the candidate's own publicly funded campaign would become subordinated to the campaign activities of unauthorized political committees. This would return the candidates to the very position of dependence upon private funds which the Fund Act was designed to eliminate.[6] *See* FEC Br. at 18-27.

Since the appellees thus fall "squarely within the 'hard core' of the statute's proscription," they may not in this suit challenge the constitutionality of § 9012(f) as if it were sought to be applied to mere groups of individuals who pooled their resources to amplify their political speech in the media. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). *See California Medical Association* v. *Federal Election*

---

[6] Data from the 1979-1980 presidential election cycle reveals the vast financial resources upon which nonaccountable political action committees may draw to make unlimited expenditures. For example, only four corporate separate segregated funds out of 1,249 made independent expenditures during the 1980 campaign, which totalled $2,767. Absent the § 9012(f) ceiling, these corporate separate segregated funds would be able to use a higher percentage of their receipts ($34,197,824 in the 1979-80 election cycle) for such expenditures in the 1984 presidential election. This Court has recognized that a separate segregated fund established and maintained by a corporation is but an extension of the corporation, the only separation being a separate account. *United States v. Pipefitters*, 407 U.S. 305, 413-17, 421, 426, 429 (1972). *See California Medical Association v. Federal Election Commission*, 641 F.2d 619, 631 (9th Cir. 1980) (en banc), *aff'd* —— U.S. ——, 101 S. Ct. 2712 (June 26, 1981). *See also* 11 C.F.R. § 114.5(d).

Commission, 101 S.Ct. at 2722 n. 17.[7] Indeed, not only does the application of the Act to the appellees not abridge the rights of the appellees' contributors to engage in political expression, either individually or jointly,[8] but it also does not interfere with the rights of the managers of such political committees to engage in political expression, either individually or jointly. Rather, application of § 9012(f) to appellees only limits the managers of these political committees in their use of funds collected from other political committees and individuals to enhance their own political speech. The Commission submits that this narrow application of the statute in furtherance of an important purpose of the Fund Act does not unnecessarily intrude upon first amendment rights.

2. Even though § 9012(f) by its terms limits all "expenditures" by unauthorized political committees without exception, AFC and AEP argue that it is inapplicable to their activities because Congress intended that § 9012(f) only limit expenditures authorized by the candidate, and not "inde-

---

[7] Appellees' challenge to the term "political committee" as too vague was rejected by this Court in *Buckley*, 424 U.S. at 79. *See also Burroughs v. United States*, 290 U.S. 534 (1934). Moreover, Congress amended the law explicitly to provide an opportunity for any person to seek an advisory opinion on statutory coverage, which must be rendered within 60 days (within 20 days to a candidate before an election). 2 U.S.C. § 437f.

[8] "[T]he transformation of contributions into political debate *involves speech by someone other than the contributors.*" *California Medical Assn. v. Federal Election Commission*, 101 S. Ct. at 2722 (emphasis in original), *quoting Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

pendent" expenditures.[9] The court below correctly rejected this argument. Not only do the expenditures of appellees constitute the very danger to the integrity of the public financing scheme which Congress intended § 9012(f) to forestall, see discussion, *supra* at 1-4, but unless § 9012(f) is interpreted to reach appellees' ostensibly "independent" expenditures,[10] it is entirely meaningless.

Section 9012(b) expressly precludes publicly financed presidential candidates from accepting any contributions at all; and as this Court held in *Buck-*

---

[9] Beyond its simple assertion that § 9012(f) does not apply to "independent" expenditures, AEP pressed no limiting construction of the statute before the district court and, in fact, withdrew its request for an advisory opinion concerning the construction of § 9012(f) two days before the Commission was to consider a response. *See* AOR 1980-61, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 3564 at 3179 *withdrawn* ¶ 51 at 160. In this Court, AEP still advances no explanation whatsoever of the provision's meaning or purpose. FCM concedes, as it did below, that § 9012(f) applies to its expenditures in support of publicly funded presidential candidates. *Amici* American Civil Liberties Union and Southeastern Legal Foundation have also agreed that § 9012(f) applies to all expenditures by political committees on behalf of publicly funded presidential candidates, including those expenditures made "independently" of a candidate's official campaign. Only AFC argues that § 9012(f) should be construed as a $1,000 limitation on contributions to presidential candidates who opt to receive public financing.

[10] AFC incorrectly states that "all parties concede in these cases that appellees, including AFC, have not coordinated their expenditures with any eligible candidate." AFC Br. at 13-14. As AFC itself notes, the administrative complaint filed by Common Cause alleging "that AFC was not independent of the official Reagan Campaign . . . is still pending" before the Commission. AFC Br. at 4 n.10.

ley, 424 U.S. at 46-47, Congress considered expenditures authorized by, or coordinated with, a candidate to constitute contributions. It would be grossly inconsistent for Congress to prohibit all contributions, including authorized expenditures, under subsection (b), and then add subsection (f) merely to permit these same coordinated expenditures up to $1,000. To circumvent the statute's plain language, AFC argues that an "expenditure to further the election" of publicly funded candidates can *only* include an expenditure that has been authorized or requested by the candidate or his authorized committees or agents, a novel result which AFC achieves only by ignoring the very terms of § 9012(f) itself. As the district court properly concluded:

> If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified campaign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses rendering the proviso unnecessary. [footnote omitted].

FEC J.S. at 7a-8a (emphasis in the original).

AFC and AEP are also incorrect in arguing that "independent" spending was limited only by FECA and not by the Fund Act. FECA, as enacted in 1971, limited only certain types of expenditures, and that limit was generally applicable to all supporters of

any candidate for federal office.[11] Section 9012(f) of the 1971 Fund Act, on the other hand, was narrowly directed at a specific problem relating to publicly funded presidential campaigns. Thus, it is operative only in the context of a publicly funded presidential campaign and only limits campaign spending by unauthorized political committees supplementing the candidate's campaign. Moreover, unlike FECA, § 9012(f) limits *all* expenditures in excess of $1,000 by such unauthorized political committees. Section 9012(f) was designed to play a separate, vital role in the public financing system: to forestall the reduction of public financing to a mere subsidy to an otherwise privately funded campaign. Without this precaution, public financing would fail to attain its highest purpose of liberating the American presidency "from the power of money to control it." 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long).[12]

---

[11] As AFC concedes, Title I of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) applied only to media expenditures. AFC Br. at 15. Thus, there is no merit whatsoever to AFC's broad assertion that "[u]nder this original statutory scheme there could be no independent expenditures since Title I of FECA required that *all expenditures* be approved in advance by the candidate." AFC Br. at 16. (emphasis added).

[12] The colloquy between Senators Goldwater and Pastore, upon which AFC relies for this proposition does not support its position. AFC Br. at 16. Senator Pastore's remark was that the limitation of *individual* expenditures by a candidate's brother, which Senator Goldwater was addressing, had been dealt with in FECA. Senator Goldwater responded that his remarks were intended to encompass his concerns about the FECA limitations, since he had not had the opportunity to speak about that bill earlier. Neither Senator made reference to the Fund Act's narrow limitation on spending by political committees to support publicly financed presidential campaign. *See* 117 Cong. Rec. 41,953 (1971).

The construction of the statutory provision proffered by AFC ignores not only the explicit words of the statute, but the very essence of the debate in Congress. The need for appropriate safeguards to ensure the integrity of the public financing scheme was explicitly raised, and raised again, in 1966 and 1967, as well as 1971. 112 Cong. Rec. 13,544 (1966) (remarks of Sen. Gore); 112 Cong. Rec. 28,765 (1966) (remarks of Sen. Long); 112 Cong. Rec. 28,781-2 (1966) (remarks of Sen. Gore); 112 Cong. Rec. 28,784 (1966) (remarks of Sen. Gore); 113 Cong. Rec. 8061-63 (1967) (remarks of Sen. Gore); 113 Cong. Rec. 8295 (1967) (remarks of Sen. Long); 113 Cong. Rec. 8308-09 (1967) (remarks of Sen. Long); 113 Cong. Rec. 9385 (1967) (remarks of Sen. Tydings); 113 Cong. Rec. 11,480 (1967) (remarks of Sen. Long). *See also* FEC Br. at 7-24. Both proponents and opponents of § 9012(f) shared that understanding; amendments were proposed both to expand and contract that limitation. *See* FEC Br. at 21-23; 117 Cong. Rec. 41,777 (1971) (remarks of Sen. Kennedy) ("unauthorized committees supporting candidates who elect public financing are limited to expenditures of $1,000" and "by allowing unauthorized committees to spend up to $1,000 for their candidate, the amendment avoids the first amendment objections that might be raised against any complete prohibition of private spending"); 117 Cong. Rec. 42,399 (remarks of Sen. Pastore) ("we are talking about committees that have not been authorized"); 117 Cong. Rec. 42,952 (remarks of Sen. Dole) ("the unauthorized committees could also solicit funds and use them for any purpose, provided they did not spend more than $1,000 to elect a President or Vice President"). *See also* 117 Cong. Rec. 41,763 (1971) (remarks of Sen. Pastore) (Summary of Fund Act). Thus, § 9012(f) was clearly not legislation by inadvertence or silence;

the issue joined over the Fund Act's provision in § 9012(f) was precisely the extent to which such expenditures outside the presidential campaign should be limited. That independent expenditures were also addressed in FECA by a Congress that believed that control of such expenditures was important for reasons apart from public financing concerns is certainly true. But with regard to the Fund Act, Congress also saw various limitations, including § 9012(f), as explicitly necessary to guarantee that public financing be a substitute for, rather than a subsidy to, private financing. *See* FEC J.S. at 23. As this Court observed in upholding the Fund Act over an equal protection challenge from minor parties, Congress sought to enact limitations on the amounts that could be spent on behalf of a publicly funded candidate, not to give major party candidates a publicly subsidized head start in the race for campaign funds. *See Buckley*, 424 U.S. at 99.

Appellees seek to support their argument by suggesting that the Commission's contemporaneous construction was that § 9012(f) would be unconstitutional unless construed to permit unlimited independent expenditures. Apart from the serious constitutional question that would arise if an agency saw fit to nullify a Congressional direction on the grounds of its own constitutional doubt,[13] Commission regulations affirm its belief in the viability of the $1,000 limitation of § 9012(f) by extending that same limit to expenditures by local party committees.[14]

---

[13] *See, e.g., Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Speigel, Inc. v. Federal Trade Commission*, 540 F.2d 287, 294 (7th Cir. 1976).

[14] The problem addressed by that regulation was obviated by Congress in the 1979 Amendments. *See, e.g.*, H.R. Rep. No. 96-442, 96th Cong., 1st Sess. at 10 (1979) ("The

AEP similarly argues that the Commission, through a staff informational letter and an advisory opinion, *sub silentio* rejected this approach to the statute by failing to note that expenditures would be limited to $1,000 by § 9012(f). AEP Br. at 19. However, neither request raised that question: one group explicitly indicated that their expenditures would be less than $1,000, AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062; the other only sought approval of the wording of a disclaimer of authorization for permitted expenditures, AO 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206. Finally AFC argues that the Commission regulations, which define qualified campaign expenses as those authorized or requested by a candidate on his or her behalf, effectively narrowed the scope of the statute. AFC Br. at 24-25. To the contrary, those regulations merely sought to assure publicly funded candidates that qualified campaign expenses are not chargeable to their expenditure limits unless specifically authorized or requested.

In sum, the district court was correct in concluding that the plain terms of § 9012(f) demonstrate Congress's intent to reach precisely those expenditures made by unauthorized political committees, independent of the candidate, which "*would* constitute qualified campaign expenses" *if* they had been incurred (authorized or requested) by the candidate or agents of the candidate. Thus, AFC's arguments that § 9012(f) reaches only expenditures *actually* authorized by the candidate contradicts the express

---

purpose of the provision is to provide state and local organizations with means to support Presidential and Vice Presidential nominees since they are prohibited from making contributions if the nominees accept general election public financing.")

language of the statute itself and would undermine the purpose of § 9012(f)—to ensure that public funding will be a substitute for private campaign financing and not a mere supplement to it.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, this Court should reverse the judgment of the United States District Court for the District of Columbia and hold 26 U.S.C. § 9012(f) consistent with the first amendment to the Constitution of the United States.

Respectfully submitted,

CHARLES N. STEELE *
General Counsel

RICHARD B. BADER
Assistant General Counsel

MIRIAM AGUIAR
JEFFREY H. BOWMAN
SONDRA L. MILLS
Attorneys

Attorneys for

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4143

* Counsel of Record

SEPTEMBER 28, 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 355230 626